Supreme Court, U.S.
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No. 90-1314

IN THE

Supreme Court Of The United States

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

In view of the fact that two of the questions presented in this petition involve harmless error doctrine, it is more than usually important that the record on the merits of the case be fairly presented to this Court. The Brief in Opposition does not do so. In this Reply, we will not address statements by the respondent that are merely argumentative descriptions of its proof, but will attempt to correct those representations that have no support in the record or are directly relevant to the questions presented. We then reply briefly to some of the State's arguments on the merits of the petition.

REPLY TO RESPONDENT'S REPRESENTATIONS OF THE RECORD

1. The respondent asserts (p. 2) that $144 million of Home State funds were "illegally transferred to ESM." The assertion is baseless. No allegation has ever been made that Home State's investments at

ESM were illegal. The State did allege that $114 million in margin payments between May and October 1983 constituted misapplication of bank funds, but the petitioners were *acquitted* by the jury of all such charges. The $144 million claimed by the respondent to have been "lost when ESM went bankrupt" (p. 2) has in fact been largely recovered by Home State through litigation and other means, and all depositors and holders of so-called "worthless debentures" (*id.*) were paid in full.

2. In its Restatement of Questions Presented (p. i, No. 2) and in the brief (p. 18), the State mischaracterizes petitioners' claim as being that the defense was not "given copies" of written instructions "before they were handed to the jury." In fact, the defendants *were not even allowed to see* the written instructions, much less to receive copies, *either before or after they were given to the jury*. The instructions were disclosed to the defense for the first time after the *sentencing*.

3. The State asserts that the trial judge before oral argument "explain[ed] to counsel the instructions the court intended to give to the jury," and that the court "read[] its written set of instructions to the jury." (Brief in Opposition, p. 9.) In fact, a brief comparison of the written and oral instructions demonstrates that the judge did not read to the jury the instructions as supplied in writing. As for the explanation of the instructions given to counsel at the charge conference, a review of the transcript of that conference fully justifies the representations made to the court by counsel for Schiebel, Warner, and Bongard that after attempting to follow what the court was saying, they were left utterly confused. (T.p. 10988-89, 10996-97.) Their requests for a copy of the instructions were characterized by the judge as "a power play on your part to make me depart from my normal procedure, to never give the lawyers the charge." (T.p. 10989-90.) Just how seriously this affected the defense is illustrated by the fact that the judge specifically promised to include instructions on the good faith defense under the securities laws (t.p. 10994), and on the principle that when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak (t.p. 10883). Those instructions, however, were not included in the notebook given to the jury. The omission triggered the sequence of events discussed in connection with the State's motion to correct the record over two years later.

4. Regarding the correction of the record, the State misrepresents the events concerning the supplemental instructions prepared in writing on the second day of deliberations (p. 10). What occurred was that Warner's counsel, without the knowledge or participation of Schiebel's counsel,[1] visited the judge that day in a renewed (but unsuccessful) effort to inspect the written instructions. At that time, counsel learned that the supplemental instructions had apparently not been included in the jury's book, and hastily attempted to recreate those instructions. They were reviewed with the prosecutors and submitted to the judge, who represented that he would add them to the jury's notebook.[2] The State is correct that petitioner Warner did not object to *this* procedure, but wrong in claiming that Warner knew the procedure would be to give the instructions "to [the] constable for delivery to the jury room." (Brief in Opposition, p. 10.)

5. In an effort to explain its delay in moving to correct the record, the State notes that the issue as to the missing instructions was raised on appeal when the petitioners' briefs were filed fifteen months after the verdict. The State then represents (p. 11): "Before the State could investigate and respond," the court of appeals "stayed the conviction appeal." Both statements are untrue. The petitioners' briefs were filed June 27, 1988, and the court's order was entered on August 10th. The order "stayed" nothing; it ordered the State to brief only the new trial issue, and "deferred pending further order of this Court" the "setting of the time for filing responses to the remaining assignments." There was never anything to hinder the State from filing a motion to correct the record at any time, and the State has never explained why it waited to do so for ten months after the petitioners raised the issue in their appellate briefs.

6. The State claims, both in the Restatement of Questions Presented (p. i, No. 3) and in its argument (pp. 9, 20-21), that the trial judge gave an "admonition prior to trial" that knowledge and intent

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[1] The State's representation that Warner's counsel was "acting on behalf of all three defendants" (p. 10), is utterly unsupported by Warner's counsel, Schiebel's counsel, or anything in the record.

[2] In light of the factual dispute between the parties on this matter, we attach as Appendices A and B to this Reply the affidavits of the assistant special prosecutor and of Warner's counsel that were submitted to the trial court on the motion to correct the record.

were not elements of the unauthorized acts offense. That is simply not so. The week before trial, the trial judge did indicate — during the course of oral argument on the proper definition of the charged offenses — a view that intent to injure or defraud might be an element of misapplication but not of unauthorized acts.[3] The judge did not rule on that matter prior to trial, but more important, even the State conceded that the mens rea was *knowledge*, not recklessness. In oral argument, the prosecutor stated: "[T]he mens rea is knowingly . . . . So it's supplied, there has to be a knowing act on the part of the defendants." (T.p. 108.) Further, the State's proposed jury instructions submitted before trial specified the mens rea for unauthorized acts as "knowingly." (T.d. 166.) Not until January 26, 1987 — the day after the State rested its case — did the prosecutor contend that the requisite mens rea was recklessness (t.d. 301), and the judge did not rule on the issue until after the defense case was completed (t.p. 10652).

The State asserts (p. 21) that Warner did not "claim that he was surprised, prejudiced or otherwise taken unaware by this charge." The transcript of the initial charging conference reflects that Warner's counsel, addressing the misapplication counts, stated (t.p. 10682-83):

> I think we are changing, trying to change the law midstream after these people have already been indicted, after the trial has started. Indeed the court said before trial that to injure or intent to injure or defraud was going to be in the charge. I think in my opening statement we have used some of that language.
>
> We have relied on that. Even when the prosecutors believe that the statute require [sic] that element, it seems to me it is an unjustifiable denial of due process for us to be changing in midstream like this and eliminating an element of the offense.

In the same argument, the defense also specifically objected to the change from "knowingly" to "recklessly" on the unauthorized acts counts. (T.p. 10686-87.)

---

[3] Ultimately, the State reversed its position on the elements of misapplication as well, and the trial judge ruled that intent to injure or defraud was not an element of the misapplication offense, either. Because the petitioners were acquitted on all misapplication charges, that issue became moot.

7. In an apparent effort to convince this Court that in any event the proof established knowledge by Warner of the board of directors' resolution, the State represents that Warner "received copies of board reports" and "attended board meetings." (Brief in Opposition, p. 21; *see also* p. 6.) In fact, the record is unequivocal that the "board reports" did not reflect the collateralization limits voted by the board, and Warner did not attend any meeting at which the resolution was adopted or discussed. Warner's own testimony that he was unaware of the resolution (t.p. 10246) was uncontradicted.

REPLY TO RESPONDENT'S ARGUMENT ON THE MERITS OF THE PETITION

1. The issue presented to this Court with respect to Section 1707.29 of the Ohio Revised Code is not whether the Ohio legislature could have enacted a statute making it a crime to fail to exercise reasonable diligence in the sale of securities.[4] That is *not* what the Ohio legislature did. Instead, the legislature explicitly made knowledge the mental element of the securities offenses with which petitioners were charged and then provided that an accused "shall be deemed to have had knowledge" where in the exercise of reasonable diligence the accused "should have" secured such knowledge. *See* Ohio Rev. Code § 1707.29. The issue presented is whether, if a legislature elects to enact the latter statute, a court may avoid the requirement that the prosecution bear the burden of proof of every element of the offense by characterizing that statute as "in effect" a definition.

The distinction between making negligence an element of the offense and deeming knowledge established upon proof of simple negligence lies at the heart of the *Sandstrom* line of cases. This Court has always looked to the statutory language to determine whether a statute relieves the prosecution of its burden of proving each element of the offense beyond a reasonable doubt. *Compare Mullaney v.*

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[4] In *Lambert v. California*, 355 U.S. 225 (1957), cited by the State, this Court struck down a municipal ordinance requiring convicted felons to register with the police because the ordinance contained no element of willfulness. *Lambert* recognizes that the power to define criminal offenses without any element of scienter is not without limitation.

Wilbur, 421 U.S. 684 (1975), *with Patterson v. New York*, 432 U.S. 197 (1977). *See also McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

Petitioners do not rely on the title of Section 1707.29 for the conclusion that it operates to relieve the State of its burden of proof, but rather on the language of Section 1707.29 itself.[5] The word "deem" commonly means to "treat as if." *See Black's Law Dictionary* (5th ed. 1979). By its terms, Section 1707.29 relieves the State of the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime by providing that knowledge must be presumed (or deemed) established upon proof of the predicate fact of failure to exercise reasonable diligence. *See Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

Contrary to the State's assertions, moreover, Section 1707.29 has always been understood to create a presumption. It was held by the court of appeals below to create a presumption. (Pet. App. C, p. 56.) The same conclusion was reached in *State v. Trivedi*, 8 Ohio App. 3d 412, 414, 457 N.E.2d 868 (1982), cited by the State.[6] Even the State, until its brief in the Ohio Supreme Court, argued that Section 1707.29 was a presumption. In the trial court, for example, the State argued (t.d. 300, p. 4):

> [Section 1707.29] specifically provides for the use of a presumption of knowledge of facts . . . .
>
> Contrary to what defendants have alleged, the State does not contend that knowledge is not a necessary element of the crimes charged in Counts 83 through 87. Instead, it is the State's position that the jury should be instructed on the presumption of knowledge of facts contained in §1707.29 in connection with the knowledge element of each offense charged . . . .

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[5] While the section headings do not constitute part of the law in Ohio, they do provide probative evidence of legislative purpose. *See State ex rel. Corrigan v. Barnes*, 3 Ohio App. 3d 40, 443 N.E.2d 1034, 1038 n.3 (1982). Moreover, the Ohio securities law contains a definitions provision, *see* Ohio Rev. Code § 1707.01, and the State does not explain why what it claims to be a "definition" was omitted from this section.

[6] *Trivedi* held that the presumption was constitutional because it was rebuttable. *Trivedi* was decided before *Francis v. Franklin*, 471 U.S. 307 (1985), and is inconsistent with it.

In the court of appeals the State argued that Section 1707.29 created a permissive inference rather than a mandatory presumption, but never contended that it was simply a definition. *See* Brief of Appellee State of Ohio at 79-85.

2. The State's assertion that the jury, with respect to one of the three securities counts, was instructed to find that Warner and Schiebel had actual knowledge of the falsity of the representations in the Offering Circular, misrepresents the record and appears in none of the opinions below. The instruction in Count 85 regarding purpose to deceive required the jury to find only that the defendants acted "knowingly" with respect to a false or misleading representation,[7] and the trial court again specifically instructed the jury as to the Section 1707.29 presumption "in regard to knowledge." (T.p. 11509.) A reasonable juror would not have understood the instruction as requiring a finding of a higher mens rea divorced from the unconstitutional presumption of knowledge.[8] This is especially true since the jury was also instructed in the initial portion of the charge that "[f]or the securities violations alleged in the indictment, the culpable mental state is knowingly." (T.p. 11470.)

---

[7] The jury was instructed (emphasis added)(t.p. 11509-10):

> To deceive in the phrase purpose to deceive means to *knowingly* deceive another or cause another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act or omission which creates, confirms, or perpetrates [sic] a false impression in another, including a false impression as to the law, value, state of mind or other objective or subjective fact.

Under the Model Penal Code, "[k]nowledge that the requisite external circumstances exist is a common element" of both purpose and knowledge. *See* Model Penal Code and Commentaries, Part I, p. 233. Thus, the unconstitutional instruction on the element of knowledge necessarily affected the jury's finding on the element of purpose.

[8] This Court has held that error in a jury charge can be cured only by language that actually explains "the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption." *Francis v. Franklin*, 471 U.S. 307, 315 (1985). Moreover, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.* at 322.

The State's attempt to rely on the instructions given with respect to Count 85 is especially ironic since the written instructions for this count, which were not made available to the defense until after trial, erroneously instructed the jury that "[i]n considering this count, you must consider [Ohio Rev. Code] 1707.29 which requires the defendants to exercise reasonable diligence to acquire knowledge they should have had in order to come to a good faith belief that the facts represented were true." (T.d. 415, p. 207.)

3. Although the State argues in a footnote that the Ohio Supreme Court evinced a clear understanding of this Court's harmless error standard, it does not even claim — except in the caption of its argument on p. 16 — that the court applied that standard to the constitutional error in refusing to disclose the written jury instructions to the defendants. Nor does the State attempt to explain how the test of harmlessness beyond a reasonable doubt can be satisfied when the Ohio Supreme Court's conclusion of "no prejudice" rested on acceptance of a constable's affidavit that supplemental written instructions were delivered, while refusing to consider jurors' affidavits that they were not, and upholding a "correction" of the record on an abuse-of-discretion standard. The State's argument seems, on this issue, to be one of waiver: that the petitioners' objection was merely to the *procedure* by which supplemental instructions were delivered, and no objection was made to that procedure.

As set forth earlier in this Reply, Warner was not advised of the manner in which the constable later claimed to have delivered the supplemental instructions, and thus had no opportunity to object. Schiebel was not even present or represented when the events occurred, and had no opportunity to object. Even more important, however, the State is incorrect in claiming that the issue is one of *procedure*. Both petitioners claim first and foremost that the supplemental instructions *never reached the jurors at all*. That this occurred was a direct result of the trial judge's adamant refusal to allow the defense to inspect the written instructions, in violation of their federal constitutional rights.

4. Petitioners' challenge to the rule of exclusive reliance on voir dire that has come to be applied by many lower courts does not seek to apply to state proceedings a heightened standard of protection

applicable only in federal courts enforcing federal criminal law. The question is whether this practice, which is found in both state and federal courts,[9] is sufficient to satisfy the minimum requirements of the Constitution where circumstances have created such a wave of public passion that jurors' claims of impartiality on voir dire are suspect. Although depositors ultimately lost none of their funds, their experience was described as a "nightmare" in one of many depositors' letters to the trial court. (T.d. 404, letter of Mark Stachler.)

Both the trial court and the Ohio Supreme Court unquestionably relied solely on the voir dire examination for their assessment of the effects of the prejudicial pretrial publicity (Pet. App. A, p. 25) and their determination as to the bias of potential jurors who had suffered the closing of their bank accounts. Contrary to the State's assertion (p. 15), however, not all three courts below "found the jury to be fair." The court of appeals reversed petitioners' convictions because it concluded, among other things, that the seating of a juror who had been denied access to her bank account denied petitioners their right to a jury composed of unbiased and unprejudiced jurors. That court concluded that Ms. Statt's "subjective protestations of impartiality cannot override the objective fact that she suffered direct and immediate economic deprivation which she perceived to be attributable to the collapse of Home State." (Pet. App. C, pp. 23-24.) The court of appeals also found error in the failure of the trial court to inform counsel that juror Dalton's mother-in-law had an account at Home State, where the court constable was informed of this information "within minutes of the verdict" (Pet. App. D, p. 7) and acknowledged that the existence of the mother-in-law's account could cause a mistrial. (Pet. App. D, p. 3.)[10] Each of these instances demonstrates

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[9] Indeed, petitioners cited a federal habeas proceeding as one example of this practice. *See Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

[10] The State introduced affidavits from Dalton, his wife and his mother-in-law which confirm that the mother-in-law mentioned her account to Dalton during the trial. In his affidavit, Dalton also admitted telling another juror that he "hated Marvin Warner" but claimed that this remark was made in jest. In light of the affidavits submitted by the State, it is difficult to fathom the State's reference to petitioners' "unprincipled attack" on juror Dalton, or its reference to the jurors' affidavits submitted by the defense as "dubious."

the inadequacy of voir dire in the circumstances of this case to protect fully the petitioners' right to an impartial jury.

Respectfully submitted,

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April 1991

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	Case No. B854622
	:	(Judge Ruehlman)
v.	:	
	:	
MARVIN L. WARNER, et al.	:	
	:	
Defendants.	:	

AFFIDAVIT OF WILLIAM H. JEFFRESS, JR.

DISTRICT OF COLUMBIA, ss:

WILLIAM H. JEFFRESS, JR., being duly sworn upon oath, deposes and says as follows:

1. I was one of the attorneys for the defendant Marvin L. Warner during the trial of this action which resulted in a jury verdict on March 2, 1987.

2. On February 20, 1987, Judge Niehaus instructed the jury in open court. He appeared to be reading from a set of written instructions. Defense counsel had requested, before oral argument, to be given a copy of the written instructions but Judge Niehaus refused the request.

3. In a chambers conference following the oral instructions, I objected to the omission of several instructions, as did counsel for the State and for other defendants, as reflected at pp. 11527-535 of the transcript. Judge Niehaus then returned to open court and further instructed the jury as reflected in pp. 11535-539 of the transcript. The jury then retired to deliberate for an hour or so that evening, and returned to continue deliberations on Saturday morning, February 21.

4. Overnight, I discussed with other defense counsel the problem of our not knowing what was contained in the written instructions given to the jury, and we determined to see Judge Niehaus the next day in another effort to inspect or obtain a copy of those instructions. That morning, co-counsel Tom Miller and I, along with an assistant special prosecutor who I believe to have been Lawrence Elleman, visited Judge Niehaus's chambers. I asked the judge whether we could now see the written instructions and he declined, saying the jury had the only copy. There followed a discussion of whether the judge's corrections and additions made in open court had been included in the written version given to them. I do not remember all the details of this discussion, but do recall that as a result of the conversation, a number of instructions were typed by the court reporter from proposals submitted by the parties, reviewed and edited by counsel, discussed with Judge Niehaus, and agreed upon. Mr. Elleman was present in chambers when this occurred. Judge Niehaus then left the room with the instructions in hand, saying he would add them to the jury's book. I did not see these additional instructions again and do not have a copy of them. To the best of my knowledge, no copies were made.

5. I have reviewed the copies of instructions attached to the affidavit of Mr. Elleman in this matter, which appear to be those typed by the court reporter on the morning of February 21. I do not believe these versions are identical to what Judge Niehaus agreed to add to the jury's book, as I recall that changes were made in what was typed by the court reporter before they were agreed upon.

6. I have reviewed paragraph 5 of the affidavit of Brenda Sellmyer dated April 24, 1989, submitted in this matter by the State. I do not recall any time when Mr. Miller, Mr. Donnellon and myself left Judge Niehaus's chambers carrying any instructions, nor do I recall Mr. Miller and myself ever being in Judge Niehaus's chambers without the presence of someone from the Special Prosecutor's office. I categorically state that when Mr. Elleman, myself and others met in chambers with the judge and agreed on the form of the instructions, Judge Niehaus then and there took the instructions personally and exited into the corridor alone, without leaving copies with me or Mr. Miller.

7. On February 25, while the jury continued deliberating with a set of instructions defense counsel had not seen, all defendants filed a formal motion asking the Court to produce to us a copy of the written instructions actually given to the jury. The Court took no action on this motion and no copy was provided to us.

8. On the day of sentencing, in the course of arguing Mr. Warner's motion for a new trial, I pointed out that we were not in a position to say whether the written instructions differed from the oral instructions because we had not seen the written instructions. Judge Niehaus responded (T.p. 11593):

> THE COURT: They have been part of the record from the beginning with the court reporter, gentlemen. It was not my obligation to copy and give them to you, Mr. Miller ought to know that, he practices locally.
>
> MR. JEFFRESS: If they are part of the record, that is fine.
>
> THE COURT: They are as I have always proceeded, and made them a copy of the record through the court reporter. They have always been there.

Before making these comments, Judge Niehaus had apparently examined the notebook used by the jury during the deliberations. During an appearance on a radio talk show the night of the verdict, Judge Niehaus stated: "I gave them a 250 page charge in writing, that they could refer to. I saw it today and it's quite dog-eared." (Defendant Marvin Warner's Motion for a New Trial, Exh. B, p. 6.)

9. After Judge Niehaus's comment on the day of sentencing, I requested my partner, Seth Waxman, to locate the instructions and if possible to obtain a copy of them. Within a day or two after the sentencing, he provided me with a copy of the instructions supplied to him by the court reporter. I reviewed them and noted numerous differences between the written instructions and those given orally. I also noticed numerous handwritten alterations in the typed instructions. I also noticed that the pages appeared out of the order in which they were numbered.

10. In order to check the accuracy of what Mr. Waxman had given me, I visited Barbara Smith, the court reporter, who showed me a black looseleaf notebook which she represented to be the instructions

provided to the jury. I compared the contents of the notebook to the copy given me by Mr. Waxman, page by page, and found them to be in all respects identical. The additional instructions given to Judge Niehaus on February 21 were not included.

11. Based on my review of the instructions, I had serious questions as to when and by whom the handwritten additions had been made, and whether the set provided us by the court reporter was complete. In a telephone interview of the jury foreman, Herman Cooper, on April 8, 1987, I inquired about the instructions and he said all the instructions were contained in a black notebook. He further said that some of the pages had handwriting on them when received, but he could not say without looking at them which pages did and which did not. At my request, he agreed to examine a copy of the instructions and review them with me. I caused a complete copy of the instructions from the black notebook to be delivered to Mr. Cooper's home on April 9, and I spoke to Mr. Cooper again by telephone on April 10 after he had reviewed them. The memorandum attached hereto, which I wrote the same day I talked to Mr. Cooper, accurately summarizes what he told me. Mr. Cooper was firm in his statement that no instructions were brought to the jury room after its deliberations began, and that the jury had no instructions other than those in the black book. Accordingly, I requested my co-counsel Robert Hastings to have the court reporter file the book of instructions in the record for purposes of the appeal, and he did so.

12. On May 1, 1989, I attempted to reach Herman Cooper by telephone and was told that he died on March 27. I then attempted to contact most of the other jurors, and succeeded in reaching five of them. Each of these jurors — Rita Lafkas, John Brady, Albert Stuck, Beth Statt and Elmer Mathes —advised me that they were not aware of any instructions other than those contained in the black notebook, and do not recall any being brought to the jury room by Mr. Donnellon or anyone else after the deliberations began.

/S/
William H. Jeffress, Jr.

Subscribed and sworn to before
me this 5th day of May, 1989.

/S/
Notary Public

[ATTACHMENT]

MEMORANDUM

TO: File

FROM: WHJ

DATE: April 10, 1987

SUBJECT: Information supplied by Herman Cooper regarding jury instructions

---

In response to my letter of April 9 transmitting a copy of the written jury instructions, Herman Cooper telephoned me today and said his recollection as to changes is refreshed by examining them. I went through the instructions page-by-page with him and he stated as follows:

P. 3: The lines were added by Cooper.

P. 5: The marks before and after the "inference" instruction were added by Cooper.

P. 9: Change was on original

P. 9A: Same

P. 21: Same

P. 19 Same

P. 12: The handwritten additions were on the original. However, the arrow was added by Cooper to show that the instruction carried over. Cooper stated he was certain that the handwritten words were on the instructions he had before him, even when I told him that other jurors recall they were not there.

P. 24: Change was definitely on the original provided to him.

P. 15: Change was on original

P. 29: Same

P. 20: The words "or criminal conduct" were on the original. He does not recall the x's over the top paragraph, but he cannot be absolutely certain whether they were or were not there.

P. 22: Change was on original

P. 38: Cooper says that in the instructions provided to him "Burton M. Bongard" on line 11 was typed as "Burton L. Bongard." He circled the "L" and wrote about it "M", in pencil. He notes that on the copy I supplied him, his markings have been erased and the "M" has been typed in; he can spot it because the "M" is out of line with the rest of the typed characters. He says this also occurred on pages 81, 89, 137, 141, 152, and 169, he believes.

P. 49: Cooper made the change in the date. He points out that the manner in which this change is made, is the same manner in which he changed the "L" to "M".

P. 198: Change was on original. Same for pages 201, 205, 209, 210, 216, 219, 220 and 221.

Cooper additionally said the handwritten changes on the original were in blue ink. His changes were in pencil.

With respect to "good faith," Cooper said that he had *only* the instructions in the book. Nobody brought any supplemental instructions to him, and the only papers he had other than the book were the verdict forms and the exhibit indexes. (I did not, when talking to him, have a copy of the good faith language from the transcript and thus did not read it to him; but Cooper was certain there were no pages of instructions given to him other than th se in the copy I supplied.)

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	Case No. B854622
	:	(J. Ruehlman)
vs.	:	
	:	
MARVIN L. WARNER, et al.,	:	AFFIDAVIT OF LAWRENCE R. ELLEMAN
	:	
Defendants.	:	

* * * *

AFFIDAVIT OF LAWRENCE R. ELLEMAN

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Lawrence R. Elleman, being duly cautioned and sworn, states as follows:

1. I am an attorney at law and have served as an Assistant Special Prosecutor for the State of Ohio since April 1985. I was one of the trial prosecutors in the prosecution of Marvin L. Warner, Burton M. Bongard and David J. Schiebel and participated in the conferences and discussions between counsel and the Court regarding jury instructions.

2. On the afternoon of Friday, February 20, 1987, Judge Niehaus delivered the instructions to the jury. Earlier in the week, Judge Niehaus had taken briefs and heard oral argument with respect to proposed instructions. Following the Court's reading of the instructions, all counsel convened in chambers with Judge Niehaus at which time he entertained objections pursuant to Crim. R. 30(A). At that time, it was agreed that several additional instructions would be read

to the jury. At the conclusion of the conference, the jury was further instructed.

3. By the completion of the instructions, it was late in the afternoon. The jury met only briefly before it was dismissed for the night.

4. The following morning, Saturday, February 21, 1987, I recall further discussions regarding typed versions of the additional instructions. In reviewing miscellaneous papers from the trial, I found in one of my files copies of several typed instructions the originals of which I believe were among those delivered to the jury. The handwriting on one of the instructions is mine; I recall writing that during discussions with Mr. Jeffress.

Further affiant sayeth naught.

/S/ _____
Lawrence R. Elleman

Sworn to and subscribed in my presence this 25th day of April, 1989.

/S/ _____
Notary Public

[ATTACHMENT]

INSTRUCTION 21

During agrument [sic], you heard considerable discussion as to motives and actions of other persons. If they acted improperly, charges could be brought against them. The only persons on trial here are the defendants and the sole purpose of this proceeding is to determine whether the defendants are guilty or not guilty. It is not to determine guilt or innocence of other persons on other charges. However, in weighing the testimony, as the court has told you before, you may consider their motives as going to the weight of their testimony, but we are only trying the case of these defendants.

* * * *

INSTRUCTION 9

Under Ohio law, a savings and loan association may invest any of its funds in bonds or interest bearing obligations of the United States, or for which the faith and credit of the United States are pledged for the payment of principal and interest. Furthermore, savings and loan associations are permitted to invest any of their funds in obligations issued or fully guaranteed as to principal and interest by agencies such as the Government National Mortgage Association. [The next sentence appears in handwriting in the original:] However, this section does not permit an unauthorized action not permitted by the Board of Directors nor does it permit a wilful misapplication of funds.

* * * *

INSTRUCTION 17

If the defendant had good faith belief in the existence of the facts represented and acted in accordance with the facts as he believed them to be, he is not guilty of selling securities fraudulently, as knowledge is an essential element of that crime.